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SEQUEL TO WORKMEN'S COMPENSATION ACTS.¹

THE object of this paper is to give notice of an impending question of great importance; not to give an answer to the question, but to show how and why it arises at the present time.

There is a movement now going on in this country for the enactment of legislation based upon the principle of the English Workmen's Compensation Act.² This legislation is founded largely upon a theory inconsistent with the fundamental principle of the modern common law of torts. As to a considerable number of the accidents covered by some of the recent statutes, the results reached under the statute would be absolutely irreconcilable with results reached at common law in cases outside the scope of the statute. This incongruity must inevitably provoke discussion as to the intrinsic correctness of the modern common law of torts; and is likely to lead, either to a movement in favor of repealing the statutes, or to a movement in favor of making radical changes in the common law.

¹ The Workmen's Compensation laws enacted in American States "all differ materially in detail and not infrequently in substance;" but they all "may be said to be pointed in the same general direction." 6 Maine Law Review, 283. "The wording of each is different from any of the others. . . . There is a great diversity as to those who come within the provisions of the various acts, the amounts paid and the manner of administering the statutes, while all the acts, *in principle*, accomplish the same result." Bradbury's Workmen's Compensation, Introduction, XI.

In foreign legislation on this topic, there are various systems. "The details of these systems vary in the different countries, but one principle underlies them all and gives a certain degree of unity to all such laws, however much they may differ in form or in method of operation." Report of Massachusetts Commission on Compensation for Industrial Accidents, A. D. 1912, p. 55.

² See the initial English statute of 1897, 60 & 61 Vict., ch. 37; and the more sweeping statute of 1906, 6 Edward 7, ch. 58. "The substitution of the words 'employer' and 'workman,' for the words familiar to the common law, 'master' and 'servant,' serves to illustrate rather a social than a legal change." . . . "It may be interesting to note the transition from the legislative use of one phrase to the other. The Master and Servant Act, 1867 (30 & 31 Vict., ch. 14), is the last of a long series, as may be seen from the schedule, where the term master and servant is employed. The Employers and Workmen Act, 1875, (38 & 39 Vict., ch. 90), is the starting point of the new nomenclature." Beven, Law of Employers' Liability and Workmen's Compensation, 3 ed., p. 5, and p. 6, note (a).

In the present movement for the enactment of such legislation, the discussion in this country has turned largely on two questions:

1. Whether justice to workmen requires the passage of such a statute?

2. Whether a proposed statute would conflict with the constitution of a state or of the United States?

Assume, for present purposes, that the first question is answered in the affirmative and the second question in the negative.³

If a proposed statute is enacted and held valid, then we predict that legislators and judges will immediately be confronted by a third question:

3. Does not justice require a further change in the law, so as to put certain persons other than workmen upon an equality with workmen?

How, and why, does this question arise?

The Workmen's Compensation Act provides for compensation (on a limited scale) by an employer to his workmen when they are damaged in the conduct of the business by pure accident; *i. e.*,

³ If any serious difficulties exist under the present constitutions, they are likely to be removed by constitutional amendments. The New York Act of June 25, 1910, was held unconstitutional in *Ives v. South Buffalo R. Co.*, 1911, 201 N. Y. 271. Thereafter the following constitutional amendment was adopted; having been passed by two successive legislatures in 1912 and 1913, and having been approved by vote of the people at the state election in November, 1913. See New York Laws, 1913, vol. 3, pp. 2220, 2226; amendment to article one of the constitution by adding a new section, 19.

"Section 19. Nothing contained in the constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

without fault on the part of any one.⁴ But if an outsider, or a paying customer of the business, is damaged by pure accident in the conduct of the business, they have generally no remedy at all against the owner of the business. If no further change is made in the law (either by legislation or judicial decision), workmen will constitute, in effect, a specially protected class, and great incongruities will exist.

Witness the following examples:

Example 1. Collision on highway between trolley car and A.'s wagon driven by its owner. Collision not due to fault of any one. Three persons suffer damage: the owner of the wagon, a paying passenger on the car, and the motorman.⁵

The motorman recovers, under the statute, partial compensation from the owner of the trolley line, his employer. Neither the wagon owner, nor the passenger, can recover against the owner of the trolley line.⁶

⁴ The English Act of 1906 "extended the principle of compensation to cover certain industrial diseases."

⁵ It is believed that, in the case of a trolley line on the surface of the highway, accidents damaging to outsiders and to passengers are more frequent than accidents damaging to employees.

The following figures have been furnished by the counsel of a large trolley road. The first column gives the percentage of claims made before a Compensation Act became effective, and the second column gives the percentage after that time.

	Before	After
Percentage of the claims made by employees	1.8	4.3
Percentage of claims made by passengers (estimated)	78.	74.
Percentage of claims made by others (pedestrians, teamsters, etc.) . .	20.2	21.7
	100.00	100.00

Of course the whole number of passengers carried far exceeds the whole number of employees. But an employee is generally exposed to the perils of the traffic more frequently and more continuously than a passenger. The passenger is carried once or twice a day; while the employee is likely to be on the trains a large part of each day. See *Buckley, L. J., in Pierce v. Provident Clothing Co.*, L. R. [1911] 1 K. B. 997, 1003. Compare 25 HARV. L. REV. 533-535.

Some part of the tracks of the trolley road above referred to run in subways, and another part is elevated. As to both of these, accidents to outsiders are rare as compared with that part of the road where the tracks run on the surface of the highway.

⁶ As to the common-law duty and liability of a Street Railway Company to passengers, see 1 *Nellis on Street Railways*, 2 ed., §§ 274, 275; 4 *Elliott on R. R.*, 2 ed., § 1402; *Newberry v. Bristol, etc. Tramway Co.*, Court of Appeal, Dec. 20, 1912, 99 *Times Law Reports*, 177; *Raymond v. Portland R. Co.*, 1905, 100 Me. 529, 532-535; *Pitcher v. Old Colony Street R. Co.*, 1907, 196 Mass. 69.

As to the common-law duty and liability of a street railway company to persons

Example 2. Collision on highway between automobile managed by the owner's hired chauffeur and A.'s wagon driven by A. Collision not due to fault of any one. The chauffeur and A. are both hurt. The chauffeur recovers (under the statute) partial compensation from the owner of the automobile. A. cannot recover against the owner of the automobile.⁷

Example 3. Collision on highway between trolley car and wagon driven by its owner. The collision was due in part to the negligence of the wagon driver and in part to the simultaneous negligence of the motorman. The negligence of each consisted in failing to use ordinary care. The motorman and the wagon driver were both hurt. The wagon driver's contributory negligence is a bar to his recovery against the owner of the trolley line. The motorman's contributory negligence does not prevent his recovering (under the statute) partial compensation from the owner of the trolley line.⁸

Example 4. Steam boiler in machine shop exploded without fault of any one. A workman in the shop was hit by a fragment of the boiler. The windows in the neighboring building of X. were broken by fragments of the boiler. Both results were consequences to be reasonably anticipated if an explosion took place. The workman can recover (under the statute) partial compensation from the owner of the shop, his employer. X. has no remedy against the owner of the shop.⁹

These very inconsistent results are due to the fact that the rule of liability adopted by the statute (liability for damage irrespective of fault) is in direct conflict with the fundamental rule of the modern

other than passengers and employees, see 2 Nellis on Street Railways, 2 ed., § 369; 3 Elliott on Railroads, 2 ed., §§ 1096, c. b. 1096, c. g.

⁷ That A. cannot recover; see Huddy on Automobiles, 2 ed., pp. xi, 27, 29; *Stefen v. McNaughton*, 1910, 142 Wis. 49, p. 52; *Lewis v. Amorous*, 1907, 3 Ga. Appeals, 50, p. 55; *Jones v. Hoge*, 1907, 47 Wash. 663, p. 665; *Cunningham v. Castle*, 1908, 127 N. Y. App. Div. 580, p. 586; 3 *Shearman & Redfield on Negligence*, 6 ed., §§ 653 a and 653 b.

⁸ Under the English Act of 1897, the workman's action is not barred by his contributory negligence, if such negligence falls short of "serious and wilful misconduct."

⁹ X. would undoubtedly fail to recover in New York and New Jersey, and probably in most of the United States. See *Losee v. Buchanan*, 1873, 51 N. Y. 476; *Marshall v. Welwood*, 1876, 38 N. J. L. 339.

Query. Would an English court allow X. to recover upon the principle stated by *Blackburn, J.*, in *Fletcher v. Rylands*, [1866], L. R. 1 Exch. 265, p. 279?

common law as to the ordinary requisites of a tort. In truth, the statute rejects the test prevailing in the courts in A. D. 1900, and comes much nearer to endorsing the test which used to prevail in A. D. 1400. In these modern days, the fundamental common-law rule as to the requisites of a tort is, that there must be fault on the part of the defendant; either wrong intention or culpable inadvertence. In early times, it was enough if the defendant's act occasioned the damage to the plaintiff; although the act might be entirely blameless. The courts did not require an ethical basis for liability.¹⁰ Gradually the law, as declared by the judges, has come round to a view exactly opposite to the ancient doctrine.¹¹

It is sufficient for present purposes to state here what the modern common law on this point actually is. It is not now necessary to consider which is intrinsically the more correct, the ancient or the modern common law; nor to trace the various stages by which, and the various dates at which, the change has been gradually brought about. Even those who think that the change was not completed until a quite recent date,¹² practically admit that it is now settled doctrine in the courts. Professor Bohlen calls the change an "astounding revolution," "an innovation;" but he also says that it is "an innovation now some four hundred years old." See 59 Univ. Pa. Law Review, 450, 451.¹³

¹⁰ See Prof. Ames, 22 HARV. L. REV. 99; Prof. Wigmore, 7 HARV. L. REV. 317; 1 Pollock & Maitland, History of English Law, 2 ed., 54.

¹¹ See Prof. Ames, 22 HARV. L. REV. 100; Kenny, Cases on Torts, 146, note. Compare Holmes on the Common Law, 89-107.

¹² See Prof. J. P. Hall, 19 Journal Pol. Econ. 698.

¹³ Without going into an extended discussion of the comparative merits of the ancient and modern views, it may be remarked that some of the reasons given by judges in favor of either view are open to criticism. There has been a tendency, both in ancient and modern times, to regard the interest of only one of the two immediate parties to the controversy. Formerly, courts sometimes seemed to consider only the innocent plaintiff. More recently, they sometimes appear to consider only the innocent defendant. Anciently the courts were often impressed with the hardship of leaving the innocent plaintiff to bear the entire loss; and hence they imposed the pecuniary burden of bearing the entire loss upon the innocent defendant; overlooking the fact that they were thus simply shifting the entire burden from one innocent party to another equally innocent party. See Doe, J., in *Brown v. Collins*, 1873, 53 N. H. 442, 445, 446. In modern times, the courts have often been impressed with the hardship of compelling the innocent defendant to shoulder the entire loss, and hence they have left the innocent plaintiff to bear it alone. It sometimes seems to be assumed that there is no possible middle ground; that either the plaintiff can recover nothing, or the defendant must be held liable for the entire damage. Professor Whittier, how-

To the above-described modern general rule there are a number of well-recognized exceptions, covering a good deal of ground.¹⁴ For some of these exceptions there are distinct and sufficient reasons, founded on considerations of public policy. Two of these exceptions specially concern the present inquiry, and will be referred to later. They are: the doctrine sometimes called the rule of *respondeat superior*; and the rule of absolute liability for extra-hazardous uses or conduct.

The initial English Workmen's Compensation Act, enacted in 1897, takes "a wholly new departure." It "takes the new line of creating a duty on the part of employers to compensate workmen" for accidental damage, irrespective of any fault on the part of their employers or their fellow servants. There is "no need to prove any negligence" of employers; "and the workman loses his right by nothing short of his own 'serious and wilful misconduct' being the cause of the accident."¹⁵ The act covers "personal injury by accident arising out of and in the course of the employment."¹⁶ The workman is not allowed full damages; his recovery being limited to partial compensation, which is generally proportioned to the wages he received. Upon a rough estimate he often receives

ever, has said: "If the law is to do anything in such cases, the sensible thing would be to divide the loss equally between the parties concerned." He adds: "The common law does not do this. The reasons no doubt are historical." 15 HARV. L. REV. 335. He is here speaking of cases where losses have been incurred through pure accident, *i. e.*, when neither party was in fault. The idea of dividing the loss *where both are in fault* has been adopted by many maritime courts. It should also be noticed that some modern judges are inclined to look, not merely at the interest of the immediate parties to a controversy, but also to consider the interest of the general public. Thus the modern doctrine—that fault is requisite to liability—has been upheld in certain cases on the ground that it is for the general interest of the community that traffic and building operations should be carried on; and that the imposition of absolute liability upon the actor would tend to discourage the doing of such acts. See Holmes, J., in *Quinn v. Crimmins*, 1898, 171 Mass. 255, 258. Doe, J., in *Brown v. Collins*, 1873, 53 N. H. 442, 448, 450; Holmes on Common Law, pp. 94-96, as to the expediency of letting loss by accident lie where it falls.

¹⁴ See condensed summary of exceptions; Prof. J. P. Hall, 19 Journal Pol. Econ. 698-700; also Pollock, *Essays in Jurisprudence*, 119-120.

¹⁵ See Pollock, *Torts*, 6 ed., 95, 104-105.

¹⁶ This provision in the English acts of 1897 and 1906 has been substantially copied in many of the American statutes. But in the statutes of some American states, and in the U. S. Act. of May 30, 1908, the words "out of and" are omitted. As to the expediency of making this omission, compare Mr. Lowell, 3 Amer. Economic Review, 189-190, and Prof. Bohlen, 25 HARV. L. REV. 546.

about half damages; and the statute is sometimes defended on the ground that it practically "divides the loss" between the workman and his employer. The English Act of 1897 applied only to certain specified occupations. But the later English Act of 1906 extends, with comparatively trifling exceptions, to the workmen in "any" employment.¹⁷

Whence arose the movement for such revolutionary legislation?

It is largely due to the introduction, in recent times, of new methods of industry. The use of modern agencies, especially steam and electricity, led to great changes in the modes of manufacturing and

¹⁷ The English statute, in terms, imposes upon *the employer* the burden of paying to the workman the compensation therein prescribed. It has, however, been said that, while the employer is thus made the primary paymaster, yet the burden can be, and is, shifted by him onto the shoulders of the consumer of the product. "The industry," it is urged, ought to bear, in whole or in part, the loss inflicted upon the workman by accident in the course of manufacturing. It is asserted that this expense is an item in the cost of production, and should and will be added to the other items; thus enhancing the price demanded by the manufacturer of the consumer of the finished product.

But the question who is, or who ought to be, the ultimate paymaster (whether it should be the employer or the consumer) is not material here. We are assuming, for present purposes, that it is just that the workman should recover; and that the employer should be made primarily liable. Our inquiry is, whether there are other persons, outside the class of employees, whose claim to recover is equal to that of the employees. Our question is, who should be allowed to recover as plaintiffs, rather than whether the employer, if held as defendant, is practically certain of reimbursement at the hands of the consumer.

If the point were material here, doubts might be suggested as to whether expense incurred by the employer in paying workmen for accidents can always be passed on by him to the consumer, as an item in the cost of production. It is difficult to see how a payment by the master of a private household to a domestic servant (under the English Act of 1906) can be "passed on" to any other person. And in the case of payments by an employer to workmen for accidents in the course of manufacturing, the manufacturer may not always be able to obtain practical reimbursement from the consumer. As to luxuries, if the price asked is materially enhanced by such payments, the consumer may sometimes prefer to deny himself and to refrain from purchasing. As to necessities, he may sometimes choose to buy an inferior, but cheaper article (one of inferior grade). Between organized labor and organized capital, the unorganized consumer fares hard (see Prof. Mechem in 44 Am. Law Review, 244); but there may be limits to his endurance.

Furthermore: if the public adopt the view that the product of the industry ought to bear any part of the loss incurred by workmen through pure accident, the question will be raised, why should it not bear the whole loss; why not allow a damaged workman (not himself in fault) to recover full compensation? Even if there are satisfactory answers to this question, it may be doubtful how far such answers would prevail with legislatures.

transportation. Workmen are now frequently employed in large masses, so that the personal supervision of the employer is no longer possible. The danger of serious harm to the workman in some modern undertakings was at first much greater than under the old forms of industry; and it was more difficult to prove fault on the part of the employer. It has been estimated that in about one half of the accidents to workmen it is impossible to prove fault on the part of any one. The accidents are not unfrequently due to dangers inherent in the method of work; and the damaging results may be viewed as "inevitable" in the broad sense of the term.

The workmen of forty years ago did not usually claim that absolute liability, irrespective of fault, should be imposed on their employers. As a general rule, they asked only to be relieved from the operation of three special defenses, by means of which employers often succeeded in defeating suits brought by workmen. The defenses thus objected to were:

1. The doctrine known as "the fellow-servant rule," or as "the common employment rule."
2. The doctrine known as "the voluntary assumption of risk."
3. The rule of "contributory negligence."

As to the first doctrine, "the grievance complained of on the part of the workmen was that, whereas an employer was liable to strangers for injury caused to them by the acts or defaults of his servants in the course of their employment, he was not liable to one servant for injury caused by the act or default of another."¹⁸ This doctrine applied only to actions by workmen; and by it the workman was placed in a worse position than an outsider. Furthermore, in applying it some courts gave a pretty broad construction to the terms "fellow-servant" and "common employment."¹⁹

The application of the doctrine of voluntary assumption of risk was not confined to actions by workmen against their employers; but it seems to have been applied in such actions more frequently and with more practical effect than in actions by other plaintiffs.

The rule of contributory negligence was applied to actions by

¹⁸ Pollock, *Essays in Jurisprudence*, 114.

¹⁹ "It was the doctrine of 'common employment,' and the lengths to which the judges carried it, that first raised the discontent of the leaders of the trade unions." Birrell, *Lectures on the Law of Employers' Liability*, 33.

other persons as often and as effectively as it was to actions by workmen.

Suppose that the legislature, without enacting a Workmen's Compensation Act, had expressly abolished all three of the above defenses so far as suits by workmen are concerned. What would the effect have been? The abolition of the first defense would have put the workman upon an equal footing with an outsider. As to the second and third defenses he would have been put in a better position than an outsider. The abolition of the defense of contributory negligence, so far as workmen are concerned, would have had a far-reaching effect. Whether confining the abolition of this defense to suits by workmen only would not be an unjust discrimination in favor of that class, is an interesting question. We do not, however, pause to discuss it; because we think that the doctrine of contributory negligence, as applied to any or all plaintiffs (*i. e.*, to plaintiffs in general), is a decadent doctrine, which will ultimately disappear from the law.²⁰

²⁰ The term "contributory negligence" should properly be applied only to those cases where the negligent acts of plaintiff and defendant each constituted a part of the legal cause; and not applied where the negligent conduct of one party was merely an antecedent condition and the negligent conduct of the other party was the entire legal cause.

Under the common law rule in England, and in many of the United States, the plaintiff is barred if his negligence constitutes any part, however small, of the compound legal cause, although the defendant's negligence may have constituted a much larger part. This drastic rule is extremely unpopular; and, if adhered to, is likely to lead to the entire abolition of the doctrine that a plaintiff's contributory negligence bars his action. A very different rule prevails in the maritime courts of some nations. See 13 Law Quarterly Review, 17. In some countries, including the United States, and, until recently, England, in a case of collision between two ships, where the fault of each is part of the cause, the loss is equally divided. In some other countries, in such a case, the loss is divided proportionately to the respective faults of the two vessels; and this rule has now been virtually adopted by statute in England. ". . . the damage or loss shall be in proportion to the degree in which each vessel was in fault." English Act of Dec. 16, 1911; 1 & 2 Geo. 5, chap. 57, § 1. If the latter rule had been generally adopted in common-law courts, the doctrine of contributory negligence would have been much less unpopular. But common-law judges might often hesitate to allow juries to make a division of loss on this basis. In the maritime courts of this country, where there is no jury, the judge might be willing to trust himself to make the division.

Able counsel, in an argument before the United States Commission, contend that, where the sum recoverable under the Workmen's Compensation Act is only about half the actual damage, the statute, in effect, divides the loss in the case of the workman's contributory negligence. They say:

"Few now would venture to maintain the justice of regarding contributory negli-

All three of the above defenses are now practically abolished wherever the ordinary Workmen's Compensation Act is in force. The continued existence of these common-law defenses is incompatible with the rule of absolute liability imposed by the "compulsory" form of the Workmen's Compensation Act. A clause of express abolition would generally be superfluous.²¹

Forty years ago, depriving a culpable employer of these three defenses would probably have satisfied the demands of the great majority of workmen. But to-day they make the far more important request that an employer should be made absolutely liable to them, even though he is entirely free from blame. And the passage of a Workmen's Compensation Act is a virtual granting of this request, so far as relates to industries within its scope.

Some comments upon, or descriptions of, this kind of legislation, if such comments are viewed as disconnected statements, might seem to ignore the basic theory of the legislation and also the in-

gence as a complete defense. This doctrine the civil and admiralty laws always have rejected. But simply to abolish the rule of contributory negligence and to make the employer liable for full damages just as if there has been no contributory negligence would not correct its injustice; it would merely shift the injustice from the servant onto the master. The compensation law solves this problem simply and justly by treating the cause of the injury as it is, namely, a joint fault, and dividing the loss accordingly, the employer paying his share in 'compensation.' 2 Report, United States Commission, 637.

But the learned counsel here assume that the cause of the injury is "a joint fault"; whereas the statute compels the employer to make partial compensation, even though he were in no fault whatever. And a workman may (under the English Act of 1897) recover against a faultless employer, even though the workman himself were negligent and his negligence contributed to cause the damage, unless his negligence amounted to "serious and wilful misconduct." This is very different from the case where the maritime law divides the loss between two parties *both of whom are in fault*.

²¹ Under the ordinary Workmen's Compensation Act, fault on the employer's part "is no longer an element of the employee's right of action. This change necessarily and logically carries with it the abrogation of the 'fellow-servant' doctrine, the 'contributory-negligence' rule, and the law relating to the employee's assumption of risks." Werner, J., in *Ives v. South Buffalo R. Co.*, 1911, 201 N. Y. 271, p. 288.

Mr. Birrell, after speaking of the provision in the English Act of 1897 as to serious and wilful misconduct, says: "But for this exception, negligence" (*i. e.*, in cases falling within the limits of the act) "has disappeared, taking with her common employment, contributory negligence, and *volenti non fit injuria*." Birrell on Employers' Liability, 89.

The defense of contributory negligence, if not actually abolished, has been so vastly modified in most of the Workmen Compensation Acts, "that it is of very little practical value to the employer." 6 Maine Law Review, 286.

consistency between that theory and the fundamental principle of the modern common law of torts.

It is sometimes alleged that a Workman's Compensation Act does not make any change in the law of torts. Eminent jurists have said that "in strictness it stands outside the law of torts altogether"; that it "is a law of compulsory insurance, and quite beyond the region of actionable wrongs"; that it creates (or, in effect, *is*) "a statutory term of the contract of service"; and that the liability thus created is "quasi-contractual" rather than "delictal."²² Again it is said: "It is not a regulation of any substantive duty, nor does it change the substantive law or the duty of the employer in any way. It is exclusively an economic readjustment of the burdens of industrial accident." It is "idle to try to borrow tort analogies, either for or against this legislation." This legislation is "not founded on tort, but is founded on the supposed economic shift of a burden from shoulders which are believed to be unable to bear it, to the employer, who is supposed to be better able to bear it and to be able to get back that cost from the public."²³ "Such 'compensation' is not 'damages' nor meant in principle to be half damages. Neither is it based upon the idea of tort, or meant to be a reparation for a wrong. In principle it is the payment of the employer's share of a common loss in a common undertaking. It has, therefore, none of the injustice of the fictions of our law by which an employer without real fault is often held liable in full damages just as though he had done a wrong."²⁴ It has also been contended that the statute is a legislative exercise of the taxing power, and not of the general police power; that it is not concerned with the adjustment of private duties or actionable wrongs, but is rather the imposition of an occupation tax upon employers in certain kinds of business; the sums levied constituting a fund for the relief of workmen who have been harmed in the conduct of the business.²⁵

But, notwithstanding these modes of characterizing this kind of

²² See Salmond on Torts, 1 ed., 99; Pollock, Torts, 6 ed., 105.

²³ Mr. Reath, vol. 2, Report of U. S. Commission 122, 127.

²⁴ Messrs. F. L. Stetson *et als*, 2 Report United States Commission, 438.

²⁵ See *Cunningham v. Northwestern, etc. Co.*, 1911, 44 Mont. 180, 209, 213; Mr. Alpheus H. Snow, in 59 Univ. Pa. Law Review, 287, 288, 291, 293-297; Mr. J. H. Boyd, in 10 Michigan Law Review, 438-439, and 1 Boyd on Workmen's Compensation, §§ 67, 70, 75, 83, 87, 88, 91.

legislation, two stubborn facts remain. First: the statute imposes upon an employer a duty of compensation, which did not exist under the modern common law of torts. Second: the theory underlying the statute, its basic principle, is in direct conflict with the fundamental doctrine of the modern common law of torts. The statute shows "a distinct revulsion from the conception that fault is essential to liability." It is "a distinct reversion to the earlier conceptions that he who causes harm, however innocently, is, as its author, bound to make it good."²⁶ This legislation "has taken a wholly new departure as regards the cases within it."²⁷ The magnitude of the change thus effected and its radical nature have been recognized by many jurists.

"The time-honored principles of the law of torts have been cast aside, a wider rule of responsibility has been framed, and no man can now say what will be the ultimate effects of the new doctrine."²⁸

"The Workmen's Compensation Act (1897) marks the commencement of a new era in the history of our jurisprudence in relation to liability for personal injuries."²⁹

"The Workmen's Compensation Act of 1897 was based upon, and introduced, a new and somewhat startling principle."³⁰

". . . The Workmen's Compensation Act, 1897, introduced a new principle into English law."³¹

"In 1897, however, legislation took a completely new turn. The Workmen's Compensation Act of that year (60 & 61 Vict., ch. 37) introduced into the law the new principle that an employer must, subject to certain limitations, insure his workmen against the risks of their employment. . . . The law, lastly, secures for one class of the community an advantage, as regards insurance against accidents, which other classes can obtain only at their own expense. . . . The rights of workmen in regard to compensation for accidents have become a matter not of contract, but of status."³²

". . . There suddenly arises from all sides an apparently just claim that a common-law system of rules, which has occupied more

²⁶ See language of Professor Bohlen, not used in reference to this legislation. 56 Univ. Pa. Law Rev. 452.

²⁷ Pollock, Torts, 6 ed., 95.

²⁸ P. B. Mignault, 44 Am. Law Rev. 719, p. 735.

²⁹ Minton-Senhouse on Accidents to Workmen, 2 ed., 109.

³⁰ Ruegg, on Employers' Liability and Workmen's Compensation, 8 ed., 263.

³¹ Beven on Employers' Liability and Workmen's Compensation, 4 ed., 345.

³² Dicey, Law and Public Opinion in England, 281-283.

than three hundred years in building up, is ethically bad and economically unsound, should be thrown into the scrap-heap with other worn-out machinery, and there should be substituted a new system based on wholly different principles unknown to the common or any other law until about twenty-five years ago."³³

"... the principle underlying the act imports into British law the novel doctrine that an employer of labor, apart from personal or constructive negligence, is a compulsory insurer, against accident, of the workmen employed by him. . . ."³⁴

"It has been said of the act that it has introduced a novel principle; but I consider that a misleading euphemism. So far from introducing a principle it has constituted a most unscientific departure from all the principles which make up and should make up the law of contract and tort. . . . I believe the contradictoriness of the legal conception has in a considerable degree contributed to the groping about of the judiciary in its efforts at defining and circumscribing the practical scope of the measure."³⁵

In external form, there are some wide differences among the various Workmen's Compensation Acts which have been proposed or enacted in the United States. But none of these differences in any way affect our contentions, that the ultimate result brought about by each and all of these Acts is, in a large number of cases, utterly incongruous with the results which would be reached under the modern common law of torts, and that these Acts are all alike based on a theory entirely inconsistent with the modern common law.

There are differences as to the mode of payment. Sometimes it may be provided, as in the English statutes of 1897 and 1906, that the statutory compensation shall be payable directly by the employer to the workman. Sometimes the employer may be required to make periodical payments to an insurance fund (to be administered by the state or by a company); and it is provided that a damaged workman shall be paid out of the fund so constituted. The present tendency of legislation is to adopt a system of

³³ Frank S. Streeter, of the New Hampshire Bar; Proceedings of the Maine State Bar Association, A. D. 1910-1911, p. 33.

³⁴ Clerk v. Lindsell, Torts, 4 ed., 98.

³⁵ Julius Hirschfeld, 13 Journal of the Society of Comparative Legislation, 119, October, 1912.

insurance, instead of payment by the employer directly to the workman.³⁶

Again, the statute may, in form, be "compulsory" or "elective." A so-called "compulsory" statute is one which, like the English Acts of 1897 and 1906, "will go into operation irrespective of the consent of the employers and employees covered by it."³⁷

A so-called "elective" or "optional" statute is one which, by the terms, permits either employer or workman to accept or reject it; and which takes effect as to either party only in case of acceptance, actual or presumed.³⁸

"Where elective laws have been adopted, generally provisions are inserted for the purpose of coercing an acceptance of the law * * *"³⁹ For example, it may be provided that, if an employer does not accept the statute, then, if sued at common law, he shall not be allowed to set up the three usual common-law defenses, known as "the fellow-servant rule," "the voluntary assumption of risk," and "contributory negligence"; and, on the other hand, if the employer accepts the statute and the workman does not accept it, then a suit brought by the workman at common law shall be subject to the above defenses. It is obvious that the statute is thus "made elective in form only to escape a fancied constitutional difficulty," and not because the legislature doubts the wisdom or justice of the result which would be reached under a "compulsory" law.⁴⁰

³⁶ As to Workmen's Compensation Acts enacted by various governments: "Many of these are on the basis of insurance, but in none is the right to compensation confined to cases where the injury was owing to the fault of the employer." 36 Reports American Bar Association, A. D. 1911, page 936.

³⁷ Vol. 1, Report of United States Employers' Liability and Workmen's Compensation Commission, p. 60.

The Arizona Act of June 8, 1912, chap. 14, §§ 2 and 4, is compulsory as to employers, but elective as to workmen. This distinction is in accord with the express requirement of the Constitution of Arizona, art. XVIII, § 8.

A compulsory act which purports to apply only to certain occupations, may contain a provision whereby employers and employees in other occupations may, by agreement, "accept and adopt the provisions of this act." See Arizona Act, § 15.

³⁸ For instances of statutes which are practically compulsory as to public employers, but elective as to private employers and their workmen, see Michigan Act of March 20, 1912, Part I, § 5, pars. 1 and 2; Wisconsin Act of May 3, 1911, chap. 50, §§ 2394-95, pars. 1 and 2. Report of Massachusetts Commission, A. D. 1912, pp. 84, 91.

³⁹ 1 Report United States Commission, 61.

⁴⁰ See 1 Report United States Commission, 61.

A great majority of the statutes now in force are "elective" in form. It is believed that the Acts of Arizona, Ohio, and Washington (and the New York Act of December, 1913) are the only existing state statutes which are compulsory as to private employers. And the Arizona act, while compulsory as to employers, is "elective" as to workmen. See Arizona Act of June 8, 1912, chap. 14, §§ 2, 4.⁴¹

The "elective" form of legislation has been severely criticized.⁴² And it has been doubted whether constitutional objections, if otherwise tenable, can be removed by adopting this optional form of legislation.⁴³

But such criticisms and objections do not affect our present discussion. The point to be made here is: that all these various forms of legislation (a direct payment by employer to workman, or payment through an insurance fund; a "compulsory" statute, or an "elective" statute) are all alike intended to bring about one and the same ultimate result; and are all alike based upon one and the same general theory. They are all intended to accomplish a result entirely incongruous with that which would be reached under the

⁴¹ The Nevada Act of 1911 was a compulsory statute, and applied only to employers in alleged extra-hazardous occupations. The Nevada Act of 1913 is elective, and applies to employments in general. The Ohio Act of 1911 was elective. In 1912 Ohio adopted a constitutional amendment (see 34 Ohio State Bar Association, pp. 63, 64) which authorized the legislature to compel employers to contribute to a State Insurance Fund. The Ohio Act of 1913 compels such contribution. See Mr. Yaple's statement of the differences between the two acts; 34 Ohio Bar Association, 64-68. "In 1910 the state of New York passed two laws relating to compensation for injured employees. One of these," (chap. 352) "was elective and applied to all employers of labor. It is still in force in New York. . . . The other" (chap. 674) "was a compulsory law applying only to certain hazardous industries." In 1911, the latter act was held unconstitutional. 201 N. Y. 171. See Report of Massachusetts Commission on Compensation for Industrial Accidents, pp. 77, 88.

In November, 1913, a constitutional amendment, printed in note 3 *ante*, was adopted in New York. The daily newspapers of Dec. 13, 1913, announced the passage of a Compulsory W. C. Act, by both branches of the New York Legislature, on Dec. 12, 1913.

⁴² It has been styled "pseudo-elective." It has been asserted that "such a law is fundamentally unsound." 1 Report U. S. Commission, 61. "It is conceded to be a piece of legislative trickery." Prof. Freund, 6 Illinois Law Review, 443. It has been called "a plan elective on the face of it, but not elective in fact;" ". . . optional in name, but coercive in substance." Prof. Freund in 2 Report U. S. Commission, 52, 53.

⁴³ See Prof. Freund, in 6 Illinois Law Review, 441, and in 2 Report U. S. Commission, 267; 2 Amer. Labor Legislation Review, 51-55. But see Holmes, J., in *Assaria State Bank v. Dolley*, 1911, 219 U. S. 121, p. 127.

modern common law of torts. And they are all alike based upon a theory (that fault is not requisite to liability) which is utterly inconsistent with the fundamental principle of the modern common law of torts.⁴⁴

Hence, in discussing the inconsistency between Workmen's Compensation Acts and the modern common law of torts, we shall hereafter make no distinction between the various forms of legislation above described. For our present purpose, one difference only among these statutes demands special attention; and that relates to the various kinds of occupation to which the different statutes apply. And it will be found that any difference in this respect does not depend upon whether the mode of payment is direct or indirect, or whether the statute is "compulsory" or "elective."

"Statutory law need not profess to be consistent with itself, or with the theory adopted by judicial decisions."⁴⁵ All statutes which are not merely declaratory are "amendments" of existing law, either existing common law or existing statutory law. The intention of the legislature is either to supplement or reverse existing law. In many cases the fact that the legislature has enacted a statute inconsistent with the common law affords no sufficient ground for asking a court (or a legislature) to reverse an established common-law doctrine as to cases not falling within the statute. But there may be strong reasons for such action by courts or legislatures in the following instances:

(1) Where a statute of large application proceeds on a theory in direct conflict with the common-law theory on a fundamental point; in other words, where the enactment of the statute can be justified only in the view that the common-law theory is indefensible in principle.

⁴⁴ ". . . The elective system does recognize the fundamental principle upon which all workmen's compensation rests, of payment for accidents that occur without fault of the injured." Mr. H. H. Smith, 10 *Michigan Law Review*, 289.

"Legislation of this character must be justified upon the ground that to make the employer liable irrespective of fault is in accordance with sound public policy. In other words, the common-law system of liability for fault no longer subserves enlightened policy which, under modern industrial conditions, should regard the fact of injury and not the question of fault as being the test of the employee's right and the employer's liability. To provide, however, for an election between the old liability and the new is in reality to place two diverse principles at the foundation of the law."

1 Report United States Commission, 63.

⁴⁵ Holmes on the Common Law, 63.

(2) Where a statute covers a large class of cases, but does not apply to other large classes of cases which, both from the standpoint of principle and from the standpoint of expediency, rest on the same ground.

In (1) the enactment is strong evidence of prevailing public opinion that the common-law doctrine is unjust. In (2) if the common law is not further altered, a large class of persons will, under the statute, enjoy rights and privileges which are not enjoyable by other large classes of persons who, on principle, have an equal claim to such enjoyment.⁴⁶

If the fundamental general principle of the modern common law of torts (that fault is requisite to liability) is intrinsically right or expedient, is there sufficient reason why the legislature should make the workmen's case an exception to this general principle? On the other hand, if this statutory rule as to workmen is intrinsically just or expedient, is there sufficient reason for confining the benefit to workmen alone; is there sufficient reason for refusing to make this statutory rule the test of the right of recovery on the part of persons other than workmen when they suffer hurt without the fault of either party?

Can the statutory discrimination in favor of workmen be supported by considerations of justice or expediency, which are applicable to workmen and not equally applicable to some other classes of persons?

Or, can the statute, although seemingly in conflict with the fundamental principle of the modern common law of torts, be defended as falling within certain well-recognized exceptions to that principle; exceptions which have been fully established at common law? Is the statutory rule a logical extension or application of one of these exceptional doctrines, or can it be deemed analogous to one of these exceptional doctrines (*i. e.*, will reasoning by analogy from one of these doctrines furnish support for the principle of the statute)?⁴⁷

⁴⁶ See Lord Hobhouse, in *Smart v. Smart*, L. R. (1892) Appeal Cases, 425, 434, 435, 436.

⁴⁷ The view that the basic principle of the Workmen's Compensation Act is merely a logical extension, or a liberal application, of established legal doctrines, does not seem to have occurred to some of the authors and lawyers, whose utterances are

As to considerations of justice and expediency urged in support of the statute.

It is argued that a part (at least) of the damage, happening to workmen in a business without fault on the part of any one, should be borne by the owner of the business, because the latter initiated the undertaking with a view to his own benefit, and because he will reap the net profit of the business if any should accrue. Indeed the assumption sometimes seems to be that the owner is to get all the benefits of the business, and that hence it would not be unjust to require him to bear all the risks encountered by the workmen and to make full compensation for the entire damage suffered by the workmen. The incorrectness of this assumption has been pointed out by Professor Mechem. The owner, or master, "in no proper sense gets all the benefits of the business." Ordinarily the master is not the only one who receives benefit. "Being employed may be just as great a benefit to the servant as the employment of him may be to his master." The employee generally takes none of the risks of the ultimate pecuniary success of the business. He usually "gets his pay, whether the business be successful or unsuccessful."⁴⁸ But waiving these objections, and assuming that the workman may justly claim that the owner should be liable to partly compensate him for harm due to pure accident (non-culpable conduct) in carrying on the business, why has not an outsider (a member of the outside public, not participating in carrying on the undertaking) a claim for compensation, at least equal in justice to that of the workman, when he (the outsider) is damaged by pure accident in carrying on the undertaking?⁴⁹

The employee is himself a part of the undertaking. He has, in one sense, voluntarily participated in it; and is deriving benefit from it. Whereas outsiders have nothing to do with the under-

quoted *ante*, pp. 246, 247. They regarded such legislation as introducing "a new principle;" as taking "a wholly new departure."

⁴⁸ See Prof. Mechem, 44 *Amer. Law Rev.*, 241-242, 227.

⁴⁹ Take the example, given earlier in this discussion, of the collision on the highway of a trolley car and a wagon; whereby, without fault on the part of any one, damage is sustained by three persons; viz., the motorman, the driver of the wagon, and a paying passenger in the car. The motorman, under the statute, recovers partial compensation from his employer, the owner of the trolley line. The wagon driver and the passenger would generally have no right of recovery. But why is not their claim equal in justice to that of the motorman?

taking. Frequently they "are exposed, without any choice on their side, to more or less risk of injury arising from what is done in the conduct of it by the owner or his servants." An outsider is not a participant in the business and "derives no direct benefit from its carrying on."⁵⁰

Why single out workmen employed in the undertaking and constitute them a specially protected class, while overlooking other persons whose claim stands on at least equal ground?

Mr. Asquith has been quoted as laying down the following proposition:

"Where a person, on his own responsibility and for his own profit, sets in motion agencies which create risk for others, he ought to be civilly responsible for the consequences of what he does."⁵¹

"Civilly responsible" *to whom?* Responsible only to workmen who have participated in the activities (the undertaking thus set in motion): or responsible also to members of the outside public who have not participated in the undertaking nor derived any direct benefit from it, but who have been exposed to risk by the carrying on of the business? If responsible to any one, why not responsible to all persons as to whom the agencies set in motion "create risk"?⁵²

If it is just to grant partial compensation to a workman in the undertaking and also to an outsider, why may not the claim of a paying customer of the business, who is damaged without fault on the part of any one (*e. g.*, a paying passenger in a trolley car) stand on at least equally strong ground? The fares paid by passengers to the common carrier in the trolley business constitute the fund out of which the motorman is compensated. The objection may, perhaps, be raised that the passenger, when entering into a contractual relation with the carrier, could have stipulated for com-

⁵⁰ See Pollock's Essays in Jurisprudence, 131-132; Prof. Mechem, 44 Amer. Law Rev. 228, 227.

⁵¹ This is understood to apply to a case where there is no negligence.

⁵² As to the requirement . . . "and for his own profit."

If this is used as meaning "for his own pecuniary advantage," it may be asked, why is there not just as much reason for liability when the defendant's purpose is to promote his own health or pleasure?

Sometimes the purpose of obtaining pecuniary profit may tend to justify conduct which would otherwise make defendant liable. For example, acts done by defendant on his own land, occasioning some damage to neighboring land, may, in some cases, be justified if done for the purpose of making beneficial use of defendant's real estate.

pensation in case of pure accident. But it is matter of common knowledge, and fully recognized by the courts, that passengers do not stand upon an equality with common carriers as to arranging the terms of the contract of carriage.⁵³ The same argument — that the party could have stipulated for compensation — was formerly used to justify the doctrine that the workman who did not so stipulate assumed the inherent risk of the undertaking. The answer that finally prevailed against this argument was, that the workman did not stand upon an equality with the employer in settling the terms of the contract of employment. The same answer applies to the relation of the passenger with the common carrier.⁵⁴

It has been asserted that the principle underlying the Workmen's Compensation Act is merely a logical extension of the doctrine as to a master's liability for the tort of his servant: a doctrine often spoken of as the rule of *respondeat superior*. By that rule, a master is liable to strangers for damage done to them by the tortious conduct of his servant while acting in the course of his employment; although the master was in no fault as to the selection of the servant, or as to the orders given to him. The master may sometimes be liable, not only for an act which he did not direct, but even for an act which he had positively forbidden.⁵⁵

Mr. Birrell says: "*Respondeat superior* is a dogma which holds in its arms the new dogma of the new Bill." ⁵⁶

Professor Freund says: "The liability of the employer irrespective of his fault is finally analogous to the general principle of the liability of the master for the acts of his servant." ⁵⁷

Here are two distinct propositions. (1) That the owner of a business, who is personally free from blame, is liable for damage caused by the tort of his servant in the conduct of his business. (2) That an owner is liable for damage happening in the conduct

⁵³ See Prof. Bohlen, 20 HARV. L. REV. 23-24.

⁵⁴ In these days of Labor Unions and collective bargaining, the assumption that *the workman* does not stand on an equality with the employer may no longer be justified in all cases. But outsiders and paying passengers are not, as yet, "organized."

⁵⁵ See Pollock, *Essays on Jurisprudence*, 114, 115; Pollock, *Torts*, 6 ed., 75, 77; Salmond, *Torts*, 1 ed., 78, 83; Salmond, *Jurisprudence*, Ed. of 1902, 466-468; Burdick, *Torts*, 2 ed., 130-132.

⁵⁶ Birrell's *Lectures on the Law of Employers' Liability*, p. 77.

⁵⁷ 6 *Illinois Law Rev.* 435-436. 2 *Am. Labor Legislation Review*, 47.

of his business without fault on the part of any one; neither the fault of himself or of his servant or of any third person. The implication of Mr. Birrell and Professor Freund seems to be that it is only a short step from proposition 1 to proposition 2. But, instead of there being only a short step from one of these propositions to the other, we should say (borrowing language used by LORD HERSCHELL in another connection) that there is a chasm between them.

In the first case, there is fault; although the owner is not personally culpable. In the second case, there is no fault whatever. Because the law holds an owner responsible for harm due to faults committed by his servants in the conduct of his business, it does not follow that the law should also hold him responsible for harm happening without any fault at all on the part of any person whatever. In the first case an existing fault of his subordinate is, whether justly or unjustly, imputed to the owner. In the second case there is no fault of any one to be imputed to him.⁵⁸

It is said by Professor Freund that the principle *respondeat superior* is "a principle of liability without fault." This is true to the extent that, by this principle, liability is imposed when there is no personal fault on the part of the "superior." But this is done only when there is fault on the part of the "inferior." It is not a principle of liability without fault on the part of any one. There may be "vicarious liability," for the torts of others, but not for the innocent (non-culpable) acts of others.

Again, Professor Freund seems to think that there is no valid distinction between the abrogation of the fellow-servant doctrine and the adoption of the rule of absolute liability maintained in the Workmen's Compensation Act. But the abolition of the fellow-servant rule makes the master liable to Servant No. 1 only when he has suffered by the fault of Servant No. 2. It does not have the effect of making the master liable for harm caused to Servant No. 1 by the non-culpable conduct of Servant No. 2. The abolition of the fellow-servant doctrine is not based on the theory that

⁵⁸ "Could a husband or master be held liable under the common law when the wife or servant had been guilty of no wrong? Would the common law have denied to the husband or master the right to prove that no tort had been committed by the wife or servant?" Werner, J., in *Ives v. South Buffalo R. R.*, 1911, 201 N. Y. 271, p. 311.

a master ought to be liable to a servant for harm suffered by pure accident, without fault on the part of any one. Such abolition is not an extension of the rule *respondeat superior*, but is the removal (repudiation) of an illogical exception to that rule.⁵⁹

In this connection Professor Freund quotes Senator Sutherland's terse statement: ". . . In the one case the master is held responsible for the fault of the dangerous agent, and in the other for the fault of the dangerous agency." The fallacy here consists in using the word "fault" as if it meant the same thing in both clauses, when in reality it is used in two different significations. "Fault of the dangerous agent" means personal fault on the part of the agent, conduct morally blameworthy. "Fault of the dangerous agency" can here mean nothing more than risk inherent to the business. A machine cannot be "in fault" in the same sense as a man.⁶⁰

Moreover, the rule of *respondeat superior* can hardly furnish ground from which to reason by analogy. The rule, in its present strong terms, was not firmly established in the common law until comparatively modern times. Its intrinsic justice has been questioned in our own day by high authority. It is, in itself, an exception to the general modern doctrine of the common law — that there is no liability in tort in the absence of fault. The *respondeat superior* rule, though exceptional, is no doubt firmly established, and not likely to be overthrown. But it is admittedly a harsh doctrine; and it is doubtful whether the arguments in its favor would have prevailed, if servants in general had had the pecuniary

⁵⁹ An eminent judge said, that the settled rule making a master, who was in no fault, liable to a stranger for the tort of his servant is intrinsically erroneous. But he also said that, if this rule is to be adhered to, then the rule that a master is not liable to one of his servants for harm done to him by the fault of a fellow-servant cannot be justified. It would be "a bad exception to a bad law." Testimony of Sir W. B. Brett, afterwards Lord Esher, before Select Committee of House of Commons, on Employers' Liability for Injuries to their Servants, Report of Committee printed in 1877, p. 115, interrogatory 1920, pp. 118-119, interrogatory 1931.

⁶⁰ It may be added that here the word "dangerous" is ambiguous. If "dangerous agency" means that the danger is so great that the use or business is extra-hazardous, then it might be held that the owner carries on the use or business at his peril. If, however, it means only that there is some risk of harm but not enough to make the use extra-hazardous, then the owner is not liable in the absence of fault on the part of himself or his servants.

ability of their employers.⁶¹ It is not a doctrine to be extended by analogy.

Here reference may be made to a "halfway" doctrine of the maritime law in favor of seamen. It originated with maritime courts; but has been recognized by common-law courts.⁶² So far as it goes, it ignores the theory of implied assumption of risk. If a seaman is taken sick or is hurt while in the service of the vessel, the ship is held for the expense of his care and cure, irrespective of fault on the part of those controlling the vessel. The ship is not, however, bound to compensate the sailor for his suffering nor for his "permanent loss of earning capacity." (This is a statement of the general outlines of the doctrine, without adverting to some points as to which there is a difference of opinion.)

Professor Freund relies on the "analogy" of this doctrine of the maritime law as to seamen in order to justify the principle of the Workmen's Compensation legislation, which practically reverses the rule of the common law as to employees in land industries. He says:

"We must remember that the law which ruled the most hazardous trade of earlier ages — that of the mariner — the common-maritime law, established the duty of relief after an accident, at least to some extent, and had the risk of industrial accident during the formative stages of the common law been as common and urgent on land as it was at sea, or as it is in many industries to-day, it is safe to say that the common law without legislation would have developed a similar liability. That the liability is now proposed to be extended beyond the period of actual sickness through the period of disability, or, in case of death, to the relief of dependents, constitutes a difference of degree and not of kind; the principle of liability is the same."⁶³

Eighty years ago, the same argument from analogy was made before Judge Story; but for the purpose of bringing about an opposite result. The aim of counsel was not to induce courts (or legislatures) to reverse the common-law rule and adopt the maritime rule, but to

⁶¹ See Pollock, *Essays in Jurisprudence*, 118; Salmond, *Jurisprudence*, ed. 1902, 468.

⁶² See, for instance, *Scarff v. Metcalf*, 1887, 107 N.Y. 211; *Holt v. Cummings*, 1883, 102 Pa. St. 212.

⁶³ Prof. Freund, 2 *Report of United States Commission*, p. 263, and p. 260; also 6 *Illinois Law Review*, 435; 2 *Amer. Labor Legislation Review*, 46-47.

induce the maritime courts to reject the maritime rule and adopt the common-law rule. In a controversy as to the liability of a ship owner for the expense of curing a seaman, it would appear that counsel for the ship owner stated the common-law rule — that a workman employed in a factory on land, if hurt by pure accident, would have no remedy against his employer; — and that they then contended that the analogy of the common-law rule as to land workmen should be applied to seamen, and that thus the maritime law should be made to conform to the common law.

But Judge Story, in effect, denied that there was a strong analogy between the cases of workmen on land and seamen on vessels; or between common law and maritime law as to this and kindred subjects.⁶⁴

Story, J., 1 Sumner, pp. 199, 200, said:

“It has been suggested, that a seaman at home cannot be entitled to any claim against the owners of the ship for injuries received in the ship’s service, any more than a mechanic or manufacturer at home for like injuries in the service of his employer. If the maritime law were the same in all respects with the common law, and if the rights and duties of seamen were measured in the same manner, as those of mechanics and manufacturers at home, doubtless the cases would furnish a strong analogy. But the truth is, that the maritime law furnishes entirely different doctrines upon this, as well as many other subjects, from the common law. Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not effect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landmen. The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea service, which do not belong to home pursuits. The law of the ocean may be said in some sort to be a universal law, gathering up and binding together what is deemed most useful for the general intercourse, and navigation, and trade of all nations. Who ever heard of salvage being allowed for saving property on land? Who ever heard of any civilized nation, which denied it for salvage services at sea, or on the sea-coast? It is impossible, therefore, with any

⁶⁴ The seaman’s feet were frozen while in the ship’s boat in the service of the ship, at the home port, before he was discharged from the ship on the return voyage. He was held entitled to recover from the owners of the ship compensation for the expense incurred in his cure. *Reed v. Canfield*, 1832, 1 Sumner (U. S.) 195.

degree of security, to reason from the doctrines of the mere municipal code in relation to purely home pursuits, to those more enlarged principles, which guide and control the administration of the maritime law."

There is another consideration in support of Judge Story's view. In the great majority of sailor cases of sickness or accident, the disease developed, or, the accident occurred, while the vessel was at sea, where no assistance was obtainable except from those in control of the vessel. The urgent necessity of the case is frequently so great that to deny the obligation on the part of the vessel is equivalent to denying any relief whatever. And so if the accident occurred during an outward voyage, it is a practical denial of relief, if, upon arriving at a foreign port, a sick or wounded sailor "can be turned adrift in strange lands without adequate provision." It is true that the maritime rule has been held to go far enough to make the ship liable for the expenses of cure where the accident took place while the ship was in the home port, and when its occurrence was not due to a peril of the sea.⁶⁵ But one cannot help supposing that the fact that a large majority of accidents take place during the voyage, and the peculiar and urgent necessity for obtaining immediate assistance in such cases, were among the most prominent considerations which induced maritime courts to establish the general rule.

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[*To be concluded.*]

⁶⁵ See *Holt v. Cummings*, 1883, 102 Pa. St. 212.